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Preparatory Commission for the International Criminal Court

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Preparatory Commission for the International Criminal Court Working Group on the Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country
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Basic principles governing an agreement to be negotiated between the International Criminal Court and the Kingdom of the Netherlands regarding the headquarters of the Court

I. Introduction

The Statute of the International Criminal Court, adopted on 17 July 1998 in Rome by the United Nations Diplomatic Conference of Plenipotentiaries, provides, in article 3, paragraph 1, that the seat of the Court shall be established at The Hague in the Netherlands ("the host State"). The Statute further provides, in paragraph 2 of the same article, that the Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties to the Statute and thereafter concluded by the President of the Court on its behalf.

By its resolution F, concerning the Preparatory Commission for the International Criminal Court, which is entrusted with the responsibility to prepare proposals for practical arrangements for the establishment and coming into operation of the Court, the Rome Conference requested the Commission to prepare, inter alia, a draft text of the Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country. At its meeting held on 30 March 2000, the Bureau of the Preparatory Commission requested the Secretariat to prepare the draft texts referred to in paragraph 5 of resolution F, including a draft text of the Basic Principles governing a headquarters agreement. The Bureau subsequently decided that the draft of the Basic Principles should be submitted for consideration to the eighth session of the Preparatory Commission.

It follows from the foregoing that, after the Court is established and the Government of the Netherlands and the Court enter, pursuant to article 3 of the Statute, into negotiations regarding the conclusion of a headquarters agreement, their negotiations on a text of the draft headquarters agreement should be governed

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by the Basic Principles. Following the conclusion of these negotiations, the headquarters agreement will have to be submitted to the Assembly of the States Parties for its consideration. After the Assembly approves the agreement, the President of the Court will conclude the headquarters agreement with the Government of the Netherlands on behalf of the Court.

It should be noted that, after the Statute enters into force and the Court or some elements of it become operational and start functioning in The Hague, there will be a period of time during which there will be no headquarters agreement. During that period the relationship between the Court and the host country will be governed by the general provision contained in article 48, paragraph 1, of the Statute, which provides that the Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

The present draft of the Basic Principles is divided into two parts. The first part enumerates general principles that should govern the preparation of the headquarters agreement. The second part lists specific principles that need to be addressed in the agreement.

II. General principles governing the headquarters agreement

1. Preparation of the headquarters agreement should be governed by the following general principles:

(a) Upon the establishment of the Court, the Government of the Netherlands and the Court should enter, as quickly as possible, into negotiations regarding the conclusion of the headquarters agreement by designating for this purpose their contact points and should proceed with these negotiations in an expeditious manner;

(b) The headquarters agreement should be based on the relevant provisions of the Statute of the International Criminal Court and should be consistent with the Rules of Procedure and Evidence and the Agreement on the Privileges and Immunities of the International Criminal Court;

(c) The headquarters agreement should address in detail primarily those issues which are not covered at all or are not sufficiently dealt with in the Statute of the Court;

(d) The headquarters agreement should be construed in the light of its primary purpose of enabling the Court to fully and efficiently discharge its responsibilities and fulfil its purposes in the host country;

(e) The headquarters agreement, which should be goal-oriented, should support the independence of the Court and provide for the long-term stability of the Court;

(f) The headquarters agreement should facilitate the smooth and efficient functioning of the Court, including, in particular, its needs with regard to all persons required by the Court to be present at the seat of the Court and with regard to the transfer of evidence in and out of the host country;

(g) The headquarters agreement should capitalize upon the relevant experience, in particular with regard to the operational issues, of the International

Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda;

(h) The headquarters agreement should ensure that the Court shall enjoy the privileges, immunities and treatment that are no less favourable than those enjoyed by any other international organization located in the host country;

(i) The headquarters agreement should be comprehensive and should attempt, to the extent possible, to resolve in an all-encompassing manner all issues required to facilitate the smooth and efficient functioning of the Court; at the same time it should provide sufficient flexibility to allow for the conclusion of supplementary agreements on matters that were not foreseen during the negotiations of the agreement or are needed for the proper implementation thereof;

(j) The headquarters agreement should specify that, whenever obligations are imposed on the appropriate authorities of the host country, the ultimate responsibility for the fulfilment of such obligations rests with the Government of the host country;

(k) The headquarters agreement should provide for its provisional application following the conclusions of negotiations between the Court and the Government of the Netherlands and pending the approval of the agreement by the Assembly of States Parties and the completion by the host country of its internal legislative procedures.

III. Specific principles governing the headquarters agreement

2. This part of the document contains basic specific principles that need to be addressed in the headquarters agreement. These principles, which are grouped as chapters, are preceded by suggestions concerning the provisions that should be included in preamble and in the article on the use of terms. The headquarters agreement may deviate from the grouping system used in this part.

Preamble

3. The preamble should refer, inter alia, to article 3, paragraphs 1 and 2, article 4, paragraph 1, and article 48 of the Rome Statute of the International Criminal Court. It should also highlight the main purpose of the agreement.

Use of terms

4. The article on the use of terms should comprise the definitions, inter alia, of "the Rome Statute", "the Court", "the Rules", "the premises of the Court", "the host country", "the Governments", "the competent authorities", "judges", "President", "Presidency", "Prosecutor", "Deputy Prosecutor", "Registrar", "Deputy Registrar", "officials of the Court", "victim", "counsel", "legal representative of a victim", "the suspect", "the accused", "witness", "expert", "States Parties", "Assembly", "representatives of States Parties" and "Vienna Convention".

Legal status and juridical personality of the Court

5. Under this principle the headquarters agreement should refer to article 4, paragraph 1, of the Statute of the Court, which provides that the Court has

international legal personality and also has such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Premises of the Court

6. Under this principle, the headquarters agreement should refer to article 3, paragraph 1, of the Statute, which provides that the seat of the Court shall be established at The Hague in the Netherlands.

7. The headquarters agreement should contain provisions on inviolability of the premises of the Court providing, in particular, that: no official of the host country should be allowed to enter the premises of the Court to perform any official duties unless permission has been given by the competent authorities of the Court; judicial actions cannot be enforced on the premises of the Court; in case of fire or other emergency requiring prompt protective action, the consent of the Court to any necessary entry into premises by the competent authorities of the host country shall be presumed; the premises of the Court shall not become a refuge from justice.

8. The headquarters agreement should contain provisions on law and authority on the premises of the Court providing, in particular, that: the premises of the Court shall be under the control and authority of the Court; the Court shall have the power to make regulations operative within the premises and may expel or exclude persons from the premises for violation of its regulations; except as otherwise provided in the headquarters agreement, the laws and regulations of the host country shall apply on the premises of the Court.

9. The headquarters agreement should contain provisions on protection of the premises of the Court providing, in particular, that: the Government of the host country shall take all the effective and adequate measures necessary to ensure the security, safety and protection of the Court, its property, premises and the immediate vicinity of the Court and shall take the necessary measures to prevent impairment of the dignity and proper functioning of the Court.

10. The competent authorities of the host country shall ensure that the Court is not disposed of any part of its premises without its consent and, if so requested by the Court, shall provide adequate police or security forces necessary to preserve law and order on the premises.

Privileges and immunities of the Court

11. Under this principle, the headquarters agreement should refer to article 48, paragraph 1, of the Statute of the Court, which contains the general principle governing the privileges and immunities enjoyed by the Court and provides that the Court shall enjoy in the territory of the host country such privileges and immunities as are necessary for the fulfilment of its purposes.

12. In addition, the headquarters agreement should include specific provisions providing that:

(a) The Court shall be entitled to display its flag, emblem and markings at its premises and on vehicles and other means of transportation used for official purposes;

(b) The Court, its property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process and from

search, seizure, requisition, confiscation, expropriation and any other form of interference and shall be exempt from restrictions, regulations, controls or moratoria of any nature;

(c) The archives of the Court and in general all documents and other materials belonging to the Court shall be inviolable.

13. Furthermore, under this principle, the Court should include the following specific provisions providing that:

(a) The Court shall be exempt from all customs duties, import turnover taxes and prohibitions and restrictions on imports and exports and its assets, income and other property shall be exempt from all direct taxes;

(b) The Court shall be exempt from taxes for purchases, for official use, of property, goods or services;

(c) The Court may receive, hold, use, transfer and convert funds, gold, securities or currency of any kind and shall in general enjoy freedom from any form of currency restrictions.

Communication facilities

14. Under this principle the headquarters agreement should provide, in particular, that: the Court shall enjoy, for any form of its official communications and correspondence, treatment not less favourable than that accorded by the host country to any intergovernmental organization or diplomatic mission and that no such official communication and correspondence shall be subject to censorship by the Government of the host country; the Court shall have the right to use codes and cipher; the Court may use all appropriate means of communication and shall have the right to establish and operate at the premises of the Court its own sending and receiving broadcasting facilities and other telecommunications equipment, in accordance with the laws and regulations of the host country; the Court shall be exempt from the licensing restrictions and permit regime and any fees associated thereto.

Public services for the premises of the Court

15. Under this principle, the headquarters agreement should include provisions providing, in particular, that: the competent authorities shall secure, upon the request of the Registrar or a duly authorized official acting on his/her behalf, the provision on equitable terms of public services needed by the Court and that, in cases where such services are made available to the Court by the competent authorities, or where the prices thereof are under their control, the rates for such services shall not exceed the lowest comparable rates accorded to essential agencies and organs of the Government; upon request of the competent authorities, the Court shall make suitable arrangements to enable duly authorized representatives of the appropriate public services to inspect, repair, maintain, reconstruct and relocate utilities, conduits, mains and sewers on the premises of the Court under conditions that shall not unreasonably disturb the carrying out of the functions of the Court.

Privileges and immunities of judges, Prosecutor, Deputy Prosecutors, Registrar and officials of the Court

16. Under this principle, the headquarters agreement should refer to article 48, paragraph 2, of the Statute of the Court, containing general provisions on the privileges and immunities enjoyed by the judges, the Prosecutor, the Deputy Prosecutors and the Registrar, and to article 48, paragraph 5, concerning waiver of such privileges and immunities.

17. In addition to this general statement, the headquarters agreement should specify, in particular, that: the immunity from legal process in respect of words spoken or written and acts done by the judges, the Prosecutor, the Deputy Prosecutors and the Registrar in discharging their functions shall continue to be accorded notwithstanding that the persons concerned are no longer occupying these positions or performing those functions; the salaries, emoluments and allowances paid to the judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall be exempt from taxation; members of families of the judges, the Prosecutor, the Deputy Prosecutors and the Registrar forming part of their households and who do not have Netherlands nationality or permanent residence status in the host country enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents.

18. Under this principle, the headquarters agreement should also refer to article 48, paragraph 3, of the Statute of the Court and ensure that the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry (hereinafter officials of the Court) shall enjoy in the host country the privileges and immunities and facilities necessary for the performance of their functions. The headquarters agreement shall define which categories of staff shall be accorded the privileges and immunities, exemptions and facilities as the Government of the host country accords to diplomatic agents of comparable rank of diplomatic missions established in the Netherlands.

19. Under this principle, the headquarters agreement should further provide that its provisions concerning the privileges and immunities enjoyed by the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and officials of the Court should be compatible with those contained in the Agreement on the Privileges and Immunities of the International Criminal Court.

20. Spouses and members of families of the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and officials of the Court forming part of their household shall be entitled to seek employment in the Netherlands. The conditions for such employment shall be agreed upon between the Court and the competent authorities of the host country.

21. In the event the Court establishes its own social security regime, all persons to whom such a regime may apply shall be exempt from all compulsory contributions to the social security system of the Netherlands.

22. The headquarters agreement should further provide that the judges, Prosecutor, Deputy Prosecutor and Registrar and officials of the Court shall have the right of unimpeded entry into, exit from and movement within the host country, including unimpeded access to the premises of the Court, as appropriate and for the purposes of the Court.

Privileges and immunities of persons taking part in the proceedings before the Court

23. Under this principle, the headquarters agreement should refer to article 48, paragraph 4, of the Statute of the Court and ensure that counsel, experts, witnesses or any other person required by the Court to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court. The provisions of the headquarters agreement concerning treatment accorded to and the privileges and immunities enjoyed by the aforementioned persons should be compatible to those contained in the Agreement on the Privileges and Immunities of the International Criminal Court.

24. The headquarters agreement should, in particular, provide that: counsel before the Court and legal representatives of victims, experts, victims, witnesses and other persons required by the Court to be present at its seat shall be accorded, during the period of their missions, the privileges, immunities and facilities necessary for the free and independent performance of their functions under the Rome Statute and the Rules of Procedure and Evidence of the Court and shall not be subjected by the host country to any measures that may affect exercise of such functions; counsel and legal representatives of victims, experts, victims, witnesses and other persons required by the Court to be present at its seat shall have the right of unimpeded entry into, exit from and movement within the host country, including unimpeded access to the premises of the Court, as appropriate and for the purposes of the Court, in accordance with the laws and regulations of the host country; experts, victims, witnesses and other persons required by the Court to be present at its seat shall not be prosecuted or detained or subjected to any other restriction of their liberty by the competent authorities in respect of acts or convictions prior to their entry into the territory of the host country; counsel and legal representative shall be provided by the Court with a certificate indicating his or her status, which shall be limited to a period of the proceedings in question; experts, victims, witnesses and other persons required by the Court to be present at its seat shall be provided by the Court with a document certifying that their presence is required at the seat of the Court and specifying a time period during which such presence is necessary; applications for visas or entry/exit permits, where required, from counsel, legal representatives of victims, experts, victims, witnesses and other persons required by the Court to be present at its seat shall be dealt with as speedily as possible and granted free of charge.

25. With reference to the accused or persons in custody, the headquarters agreement should provide that the host country shall not exercise its criminal jurisdiction over persons in its territory who are to be or have been transferred as an accused or, in accordance with article 93, paragraph 7, of the Rome Statute, as a person in custody to the premises of the Court pursuant to a request or an order of the Court, in respect of acts, omissions or convictions prior to their entry into the territory of the host country.

Cooperation between the Court and the host country

26. Under this principle the headquarters agreement should provide that the Court and the host country are under the obligation to cooperate with each other regarding the implementation of the agreement.

27. The headquarters agreement should further provide that the Court shall cooperate at all times with the competent authorities to facilitate, to the extent possible, the proper administration of justice, secure the observance of police regulations and prevent any abuse in connection with the privileges, immunities and facilities accorded under the present agreement and that it is the duty of all persons enjoying the privileges and immunities under the headquarters agreement to respect laws and regulations of the host country.

28. The headquarters agreement should provide that the competent authorities of the host country shall take effective and adequate action to ensure the appropriate security, safety and protection of persons referred to in the agreement, which is indispensable for the proper functioning of the Court, free from interference of any kind.

29. The headquarters agreement should also provide for general procedural provisions concerning cooperation in operational matters such as transit and the enforcement of sentences under article 103, paragraph 4, of the Rome Statute.

30. The headquarters agreement should provide that the Court shall notify the competent authorities of the host country of the names and categories of persons to which the agreement shall apply, in particular the officials of the Court, counsel, victims, legal representatives of victims, experts, witnesses and other persons required by the Court to be present at the seat of the Court.

Amendments

31. Under this principle, the headquarters agreement shall include a provision providing that the agreement may be amended by mutual consent of the parties.

Settlement of disputes

32. Under this principle, the headquarters agreement should provide that the Court shall make suitable provisions for the settlement of:

(a) Disputes arising out of contracts and other disputes of a private law character to which the Court is a party;

(b) Disputes involving officials of the Court who, by reason of his or her official position, enjoys immunity, if such immunity has not been waived.

33. With reference to disputes that may arise between the Court and the Government of the host country concerning the interpretation or application of the headquarters agreement or of any supplementary agreement that cannot be settled amicably, the agreement may provide that they should be referred, at the request of either party to the dispute, to an arbitral tribunal and should include provisions regarding the composition and functioning of such a tribunal.